Supreme Court, U.S.
FILED
07-264 AUG 24 2007
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

JOY PHILLIPS,
Petitioner.
v.
DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT,
Respondent.

On Petition for a Writ of Certiorari to the Fifth Court of Appeals of Texas at Dallas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court violated Petitioner's right to due process of law under the United States Constitution by permitting the withdrawal of the guardian ad litem appointed for her and entering a default judgment terminating her parental rights when the trial court knew she was incompetent due to mental illness.

2. Whether the Texas Fifth Court of Appeals erred and violated Petitioner's right to due process of law under the United States Constitution in holding that Petitioner was not entitled to relief from the default judgment against her because she did not comply with the requirements for a bill of review under Texas law.

PARTIES TO THE PROCEEDING

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OPINIONS BELOW

The opinion of the Fifth Court of Appeals of Texas at Dallas is reported as *Phillips v. Dallas County Child Protective Services Unit,* 197 S.W.3d 862 (Tex. App.–Dallas 2006, pet. denied).[1]

JURISDICTION

The Fifth Court of Appeals of Texas at Dallas filed its opinion on July 20. 2006,[2] and overruled Petitioner's Motion for Rehearing on August 4, 2006.[3] The Texas Supreme Court denied review on June 1, 2007.[4] This petition is filed within ninety days of denial of review by the Texas Supreme Court. This Court has jurisdiction to review the decision of the Fifth Court of Appeals of Texas at Dallas on a writ of certiorari under 28 U.S.C. § 1257.

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[1] Appendix, A-7

[2] Appendix, A-7

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[4] Appendix, A-18

CONSTITUTIONAL PROVISIONS, RULES, AND CODE PROVISIONS INVOLVED[5]

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Rules and Code Provisions

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[5] The constitutional provisions, rules, and code provisions involved are reproduced in the appendix. See Index at A–1.

STATEMENT OF THE CASE

Petitioner, Joy Phillips, seeks a writ of certiorari to review the holding of the Fifth Court of Appeals of Texas at Dallas that, while the trial court erred in dismissing the guardian ad litem appointed to represent Phillips, who was mentally incompetent, and erred in proceeding to enter a default judgment against Phillips terminating her parental rights, she was not entitled to relief because she did not appeal within the proper time frame,[6] and was not entitled to relief under the Texas bill of review procedure because she did not meet all the requirements for a bill of review.

Phillips, a woman from Nigeria with two children, has lived in the United States since 1999 and has worked in various jobs in this country. From November 20, 2003 to December of 2004, she continually suffered from mental illness, including schizophreniform disorder.

A competency hearing on February 13, 2004 in connection with Phillips's commitment for mental illness determined that she had neither "sufficient ability to consult with a lawyer with reasonable degree of rational understanding" nor "a rational as well as a factual understanding of the charges against her." On February 23, 2004, respondent, Dallas County Child Protective Services, filed a petition to terminate Phillips's parental rights.

On March 19, 2004 the district court appointed April

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[6] Phillips's incompetency due to mental illness prevented her from appealing within the normal time frame.

Smith as "Atty. For Mother–Joy Chioma Nwokoie aka Joy Chioma Phillips."[7] Smith later appeared as "GUARDIAN AD LITEM FOR RESPONDENT (Phillips)" at a hearing on May 21, 2004.

On March 26, 2004 Smith attempted to file an answer. Moments later, at a hearing before the district court, the record reflects "Joy Phillips appeared by attorney (sic) guardian April Smith." The judge's docket entry of "3-2[6]-04" correspondingly lists the parties present at that hearing as "DA, DFPS, RM Guardian."

The court of appeals opinion erroneously states that "nothing in the record shows the answer was ever withdrawn."[8] Contrary to this statement, the docket sheet reflects that Smith immediately withdrew the answer she had filed: "RMGuardian w/drew her Answer, filed mistakenly on behalf of RM–request granted."

On May 21, 2004 the trial judge permitted the guardian ad litem to withdraw on the basis that Phillips had not stayed in contact with the guardian. At that point, the trial judge thought Phillips was still confined to a mental health hospital. The judge knew that Phillips was incompetent and should have known she was not capable of cooperating with the guardian. After allowing the guardian to withdraw the court proceeded to

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[7] At the time of trial, TEX. R. CIV. P. 173 required the appointment of guardians for defendants who were non compos mentis. See text of rule in effect at that time at A-3.

[8] Court of appeals opinion. Appendix, A-12

render a default judgment against Phillips terminating her parental rights. At that point Phillips did not have the ability to understand or know what she could have done to prevent the termination of her parental rights.

Phillips's mental illness prevented her from learning of the default judgment terminating her parental rights until December 29, 2004. She filed her bill of review on March 18, 2005. Child Protective Services filed a motion to dismiss. Phillips filed a motion for summary judgment on June 16, 2005. The trial court denied the bill of review by order dated November 17, 2005 and Phillips appealed.

The Fifth Court of Appeals of Texas at Dallas upheld the default judgment against Phillips by opinion dated July 20, 2006[9] and denied her motion for rehearing on August 25, 2006.[10] On June 1, 2007, the Texas Supreme Court denied Phillips's Petition for Review.[11]

Phillips raised the issue of whether she had received due process of law in her petition for bill of review in the following language: "Plaintiff was not afforded due process because the ad litem failed to follow the rules regarding withdrawal of attorney. At no material time was Plaintiff competent to defend the suit brought by Defendant." (Plaintiff's Original Petition for Bill of Review, paragraph VIII).

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[9]Appendix, A-6, A-7

[10]Appendix, A-17

[11]Appendix, A-18

In her brief in the court of appeals, Phillips included Issue 3: "The Court should have appointed an attorney to represent Plaintiff because service of process was by substituted service and she neither answered or appeared." Before the court of appeals Phillips relied principally on the argument that she had not been properly served with citation. The court of appeals rejected that argument, holding that an answer filed by the attorney appointed to represent Phillips (the attorney withdrew the answer and withdrew from representation before the final hearing) waived any defect in service.[12]

In her motion for rehearing Phillips raised the adequacy of the representation in the following language: "Ms. Phillips furthermore respectfully submits that, on account of a lack of any notice of the hearing–actual or statutory–and a lack of representation, the State did not afford Ms. Phillips due process, especially in view of her ailing mental state." (Appellant's Motion for Rehearing, paragraph 30).

When the court of appeals overruled Phillips's motion for rehearing she petitioned the Texas Supreme Court for review. The petition contained the following point: "The trial court's granting a default judgment against Phillips, a mentally incompetent person who had not been served with citation, without appointing an attorney ad litem to represent her, and without complying with other procedural safeguards, deprived her of procedural and substantive due process under both Texas and federal law." (Petition for Review, point II).

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[12] Court of appeals opinion, A-11, A-12

REASONS FOR GRANTING THE PETITION

I. THE HOLDING OF THE TEXAS FIFTH COURT OF APPEALS THAT NO REVERSIBLE ERROR RESULTED FROM THE TRIAL COURT'S PERMITTING THE GUARDIAN AD LITEM APPOINTED FOR THE MENTALLY INCOMPETENT PETITIONER TO WITHDRAW AND ENTERING A DEFAULT JUDGMENT AGAINST HER IN VIOLATION OF HER RIGHT TO DUE PROCESS OF LAW CONFLICTS WITH OPINIONS OF THIS COURT.

II. THE HOLDING OF THE TEXAS FIFTH COURT OF APPEALS THAT PETITIONER WAS NOT ENTITLED TO RELIEF FROM THE DEFAULT JUDGMENT AGAINST HER BECAUSE SHE DID NOT COMPLY WITH ALL THE REQUIREMENTS FOR A BILL OF REVIEW UNDER TEXAS LAW VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW BECAUSE, DUE TO HER MENTAL ILLNESS, SHE HAD NO NOTICE OF THE DEFAULT JUDGMENT AGAINST HER UNTIL THE TIME FOR AN ORDINARY APPEAL HAD RUN, AND HOLDING HER STRICTLY ACCOUNTABLE TO MEET THE DRACONIAN REQUIREMENTS OF THE TEXAS BILL OF REVIEW PROCEDURE DEPRIVED HER ENTIRELY OF HER RIGHT TO AN APPEAL.

The United States Constitution prohibits any state from depriving any person of life, liberty, or property without due

process of the law. U.S. Const. amend. XIV, § 1.[13]

Phillips's affidavit in support of her bill of review shows that, due to her mental illness, she did not learn of the termination of her parental rights until December 29, 2004, well beyond the thirty-day period for appealing from the judgment under TEX. R. CIV. P. 329B.[14] Her affidavit also shows that, at the time of her termination proceedings, she was incapable of cooperating with her guardian ad litem. This fact is also demonstrated by testimony at her competency hearing in February, 2004.

Because of a lack of legal representation and a lack of any notice of the termination hearing and the default judgment against her—statutory, constructive, or actual—the courts of Texas did not afford Phillips either procedural or substantive due process.

In *Lassiter v. Department of Social Services of Durham County, North Carolina,* 452 U.S. 18, 27, 31 (1981), this Court adopted the balancing test set out in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), for determining when appointment of counsel is required for parents in cases involving termination of parental rights. Under that test, the private interests of the parents, the interest of the state, and the risk the procedure in question will lead to an erroneous result are all to be balanced against each other. If the procedure poses a substantial risk of an erroneous result, then due process requires appointment of

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[13] Appendix, A-2

[14] Appendix, A-3

counsel for the indigent or incapacitated parents against whom termination of parental rights is sought. *Mathews,* 424 U.S. at 335. *Lassiter,* 452 U.S. at 31, also adopted the approach of *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973), to the effect that proper application of the *Mathews* criteria is to be determined on a case-by-case basis.

At the time Child Protective Services sought to terminate Phillips's parental rights, she had been found incompetent and confined to a mental health hospital. Testimony at her commitment hearing indicated she was incapable of cooperating with a lawyer or of understanding the charges against her. Aware of these facts, the trial court appointed an attorney named April Smith as personal representative for Phillips. The court of appeals opinion holds that the trial court appointed her an attorney ad litem. Petitioner believes the record actually demonstrates Smith was only appointed as a guardian ad litem. Whether as attorney ad litem or guardian ad litem, Smith filed an answer for Phillips.[15]

The court of appeals rationalizes that the "answer" filed by April Smith subjected Phillips, who had not been properly served, to the jurisdiction of the trial court. *Phillips,* 197 S.W.3d at 865.[16] Although the court of appeals states the answer

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[15] In connection with the answer, the court of appeals refers to Smith as attorney ad litem. In connection with her withdrawal from the case, the court refers to her as guardian ad litem. Court of appeals opinion, A-11, A-12, A-13.

[16] Appendix, A-11, A-12

was never withdrawn, in fact, it was almost immediately withdrawn, with permission of the trial court.

Under these circumstances Smith's appointment was completely to Phillips's detriment. The appointment, which the trial court considered to be the appointment of a guardian ad litem, resulted in an answer being filed and then withdrawn, probably because both Smith and the trial court realized the filing of an answer by a guardian ad litem was not appropriate.

On the day of what turned out to be the final hearing the trial court allowed Smith to withdraw, leaving Phillips with no answer on file and no attorney to represent her, whereupon the trial court converted what was supposed to be a pretrial hearing into the final hearing, held Phillips was "wholly in default," and entered a termination decree against her.

If Smith had been appointed as attorney ad litem, the trial court presumably would not have allowed her to withdraw and then defaulted Phillips, since appointment of an attorney ad litem contemplates that the attorney appointed will actually provide legal representation at trial. A diligent attorney ad litem could have moved for a continuance and sought to muster evidence on Phillips's behalf. Testimony at Phillips's competency hearing on February 13, 2004 indicated that, while she was incompetent at that time, she would regain her competency in the future. Testimony from a mental health professional might well have established that, in the future, Phillips would regain competency and be a fit mother for her children, so that termination was not necessary.

The procedure used by the trial court resulted in a

mentally incompetent mother's being subjected to the jurisdiction of the court even though she had not been properly served, and further resulted in the withdrawal of the personal representative appointed by the court to represent her, and the taking of a default judgment against her with no notice.

Since Phillips received no notice of the default judgment the procedure also resulted in her time for appeal running before she had notice of the judgment against her, and in the ultimate ruling of the court of appeals that, while the trial court erred in permitting the withdrawal of the attorney appointed for Phillips, and in permitting the taking of a default judgment against her, Phillips had no remedy because she did not comply strictly with the Texas bill of review procedure.

Under these circumstances, the procedure used by the trial court was calculated to lead to an erroneous result–the parental rights of a mentally incompetent parent terminated without representation and without notice–and the procedure used resulted in an unconstitutional deprivation of due process under the principles set out in *Lassiter*, 452 U.S. at 31.

The only evidence the trial court had indicating that Phillips should be terminated was the fact that she was mentally ill. *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982) requires that termination of parental rights should not occur without clear and convincing evidence justifying termination. Since mental illness is treatable and controllable, the fact a parent is mentally ill does not in and of itself provide clear and convincing evidence justifying termination. The termination of Phillips's parental rights by the trial court therefore conflicts

with the principles set out in *Santosky*, 455 U.S. at 769-70.

The State of Texas has applied the principles of *Strickland v. Washington,* 466 U.S. 668 (1984) to require that, where attorneys are appointed to represent parents in termination cases, the attorneys must render effective assistance of counsel. *In Re M.S.*, 115 S.W.3d 534, 544 (Tex.2003).[17]

In Phillips's case, the attorney appointed to represent her did not render effective assistance of counsel. She subjected Phillips, who had not been properly served, to the jurisdiction of the court by filing an answer, which she immediately withdrew. Then she asked the trial court to allow her to withdraw from representing Phillips because she had not been able to confer with her client due to Phillips's mental illness. A diligent attorney would have sought a continuance until it could be determined whether mental health treatment would restore

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[17] TEX. FAM. CODE § 107.013(a)(1) (See A-2) requires appointment of an attorney ad litem for an indigent parent in a termination suit filed by a governmental unit where the parent responds in opposition to termination. No doubt Phillips was indigent, and she did respond in opposition by indicating in an interview with CPS that she missed her son and wanted her son. Such an manifestation of opposition is sufficient under Texas law to raise the entitlement to appointment of an attorney ad litem. *In Re T.R.R.*, 986 S.W.2d 31, 37 (Tex. App.–Corpus Christi 1998, no pet.); *In Re C.D.S.*, 172 S.W.3d 179, 184 (Tex. App.–Fort Worth 2005, no pet.). According to the court of appeals, the trial court did appoint an attorney ad litem, April Smith, although the trial court categorized the appointment as that of a guardian ad litem. However, Smith was allowed to withdraw before trial, so the appointment was not maintained through trial. See court of appeals opinion, A-11, A-12, A-13.

Phillips's competency. Instead, Smith withdrew, leaving her client with no representation, and allowing the trial court to terminate her client's parental rights with no notice and no representation.

M.L.B v. S.L.J, 519 U.S. 102, 104 (1996), holds that an indigent mother appealing termination of her parental rights was entitled to a free transcript. The impediment to her appeal posed by requiring her to pay for a transcript denied her due process of law.

In Phillips's case, the court of appeals held that the trial court erred in allowing the withdrawal of the guardian ad litem appointed to represent Phillips, and in entering a default judgment against Phillips, but held Phillips was not entitled to relief because she did not meet all the requirements for a bill of review under Texas law.[18]

The court of appeals holds that, to prevail in her bill of review, Phillips had to prove that she (1) had a meritorious defense, and (2) she was prevented from asserting it by fraud, accident, or wrongful act of the opposing party or official mistake, (3) without any fault or negligence of her own. *Phillips*, 197 S.W.3d at 866, *citing In Re T.R.R.*, 986 S.W.2d at 35; and *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d. 996, 998 (1950). The court held that Phillips established the first and third of these elements, but failed to establish the second.

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[18] *Phillips v. Dallas County Child Protective Servs. Unit*, 197 S.W.3d at 866, 867, Appendix, A-14, A-15.

Notwithstanding the fact that several Texas courts have held that the second element of proof for a bill of review may be met by showing that a mistake by the court itself [19]deprived a litigant of a fair hearing, [20] the court of appeals held that Phillips failed to meet the second element of proof for a bill of review and denied her appeal.

Since Phillips, due to her mental illness, had no notice of the default judgment against her until the time limits for an ordinary appeal had run, holding her strictly accountable for all elements of proof for a bill of review arbitrarily denied her an appeal and denied her due process of law, just as denial of a transcript to an indigent did in *M.L.B. v. S.L.J.*, 519 U.S. at 104. The court of appeals decision further violated Phillips's due process rights because the court failed to hold, in accordance with case law of the state of Texas, that a mistake by the trial judge met the second element of proof for a bill of review under Texas law.

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[19] Such as the trial court committed in allowing the withdrawal of the guardian ad litem and in permitting of the taking of a default judgment.

[20] *Vogel v. Vogel*, 405 S.W.2d 87, 90 (Tex. Civ. App.–San Antonio 1966, no writ); *Baker v. Goldsmith*, 582 S.W.2d 404, 407 (Tex.1979); *In Re T.R.R.*, 986 S.W.2d at 37; *O'Bryan v. Harris County*, 583 S.W.2d 896 (Tex. Civ. App.–Houston [14th Dist.] 1979, writ ref'd n.r.e.)

CONCLUSION

Because the circumstances required the appointment of an attorney ad litem under *Lassiter,* 452 U.S. at 31, because there was no clear and convincing evidence justifying termination under *Santosky,* 455 U.S. at 769-70, because Phillips did not have effective assistance of counsel under *Strickland*, 466 U.S. 668, and *In Re M.S.*, 115 S.W.3d at 544, and because denial of her appeal on the basis she failed to meet all the elements of proof for a bill of review under Texas law violated her due process rights, the Supreme Court should grant certiorari and reverse the decision of the Fifth Court of Appeals of Texas at Dallas.

Respectfully submitted,

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Constitutional Provisions

United States Constitution, Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules and Code Provisions

TEX. FAM. CODE § 107.013(a)(1)

Mandatory Appointment of Attorney Ad Litem for Parent

(a) In a suit filed by a governmental entity in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interest of:

(1) An indigent parent who responds in opposition to the termination;

TEX. R. CIV. P. 173

When a minor, lunatic, idiot, or a non-compos mentis may be a defendant to a suit and has no guardian within this State, or where such person is a party to a suit either as a plaintiff, defendant or intervenor and is represented by a next friend or guardian who appears to the court to have an interest adverse to such minor, lunatic, idiot or non-compos mentis, the court shall appoint a guardian ad litem for such person and shall allow him a reasonable fee for his services to be taxed as part of the costs.[1]

TEX. R. CIV. P. 329B

Time for Filing Motions

The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rule 316) in all district and county courts.

(a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.

(b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for

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[1] This is the text of the rule as of the time of the Phillips trial. The rule was extensively changed in 2005.

new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

(c) In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.

(e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

(f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

(g) A motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rule 316), if filed, shall be filed and

determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial. Each such motion shall be in writing and signed by the party or his attorney and shall specify the respects in which the judgment should be modified, corrected, or reformed. The overruling of such a motion shall not preclude the filing of a motion or new trial, nor shall the overruling of a motion for new trial preclude the filing of a motion to modify, correct, or reform.

(h) If a judgment is modified, corrected, or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule 316 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

(Seal)
State of Texas

Court of Appeals
Fifth District of Texas at Dallas
JUDGMENT

JOY PHILLIPS, Appellant		Appeal from 305th Judicial District Court of Dallas County, Texas (Tr.Ct.No. 05-00378-X)
No. 05-06-00147-CV	V.	Opinion delivered by Justice Wright, Justices Moseley and Lang participating.
DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT, Appellee		

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**. It is **ORDERED** that appellee DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT recover its costs of this appeal from appellant JOY PHILLIPS.

Judgment entered July 20, 2006.

s/CAROLYN WRIGHT
CAROLYN WRIGHT
JUSTICE

AFFIRM and Opinion Issued July 20, 2006

(Seal)
The State of Texas

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-06-00147-CV

JOY PHILLIPS, Appellant

V.

DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT, Appellee

On Appeal from the 305th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 05-00378-X

OPINION

Before Justices Wright, Moseley, and Lang
Opinion by Justice Wright

Joy Phillips appeals the trial court's order denying her

bill of review challenging a default judgment terminating her parental rights. In three issues, appellant contends (1) the trial court did not have personal jurisdiction over her because she was not properly served with process; (2) due to the defective service of process, appellant is not required to show a meritorious defense or lack of fault on her part to obtain a new trial; and (3) the trial court erred by failing to appoint an attorney to represent appellant. We affirm the trial court's order.

Factual and Procedural Background

On February 23, 2004, Dallas County Child Protective Service (CPS) filed a petition to terminate appellant's parental rights. At the time, appellant was an in-patient at Terrell State Hospital. On March 3, 2004, a copy of the petition was forwarded to the hospital. The return portion of the citation is stamped "unexecuted" and states it was delivered to "Joy Nwokorie." Thereafter, on March 9, 2004, a second copy of the petition was forwarded to Terrell State Hospital. The return portion of the citation does not have a date file mark and shows it was received by the Chief Financial Officer for the hospital. The return does not indicate the CFO is an authorized agent for the hospital.

On March 19, 2004, after determining appellant was indigent, the trial court "pursuant to the Texas Family Code" appointed an "attorney ad litem" to "represent" appellant. On March 26, 2004, trial counsel filed an answer generally denying

the allegations in the petition for termination. The same day, the trial court set a "Pretrial/Status" hearing for May 21, 2004. On April 15, 2004, the trial court signed a "Substitute Order of Appointment" appointing the aforementioned attorney ad litem as guardian ad litem. The order stated that pursuant to the Texas Family Code and because appellant was indigent, the trial court was appointing a "guardian ad litem" for appellant.

At the May 21, 2004 hearing, the trial judge stated it was her "understanding ...that [appellant] has not stayed in contact with [trial counsel]. That she is scheduled to be released from Terrell.[1] And, at this point, there has not been any type of answer filed in this matter and [appellant has] not responded. The Court is prepared to dismiss [trial counsel] as the guardian in this matter."[2] Trial counsel then added that she had contacted appellant's caseworker at the hospital "numerous" times and had scheduled visits that appellant cancelled. Trial counsel also contacted appellant directly several times, but she would not speak with counsel and would not consent to a visit. Consequently, trial counsel stated she had no objection to withdrawing. The trial court then "dismiss[ed trial counsel] as [appellant's] guardian." Without appointing a replacement, the trial court proceeded with a brief

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[1] Appellant states in her bill of review that she was released from Terrell on May 7, 2004, before the May 21, 2004 hearing.

[2] The trial judge mistakenly stated that an answer had not been filed. Soon after her appointment as attorney ad litem, appellant's trial counsel filed an answer on her behalf.

evidentiary hearing on the allegations in the petition for termination, and later entered a default judgment terminating appellant's parental rights.

Several months later, appellant filed a petition for bill of review challenging the default judgment. Appellant alleged she was not served with process as required by law and that the trial court erred in allowing appellant's attorney to withdraw. In her affidavit in support of her bill of review, appellant explained that CPS became involved with her family after she was arrested and taken to jail. While she was incarcerated she was found to be mentally incompetent and was committed to Terrell State Hospital. She was released on May 7, 2004. She was homeless and stayed at boarding houses and shelters for the next few weeks. She was arrested again on October 26, 2004 and was again committed to Terrell State Hospital. During her second hospitalization, she learned of the judgment terminating her parental rights. According to appellant, she was continually mentally ill from November 20, 2003 until December 2004. She did not appear at the final hearing due to "a lack of knowledge of the date of the hearing, her fear of the judicial system, and a lack of understanding." In response, CPS filed a motion to dismiss claiming the trial court should dismiss appellant's bill of review because appellant "failed to state a cause of action and a claim on which relief can be granted." In the motion, CPS maintained appellant was properly served and that the trial court never appointed an attorney ad litem but appointed trial counsel as a guardian ad litem due to appellant's

mental status. Thereafter, appellant filed a motion for summary judgment claiming she was entitled to judgment as a matter of law. Following a hearing, the trial court signed a document entitled "Order denying Bill of Review" stating that following a hearing and submission of briefs, the trial court granted CPS's motion to dismiss. This appeal followed.

Discussion

In her first issue, appellant contends we must reverse the order denying her bill of review because she was not properly served.

The trial court can acquire personal jurisdiction over both parties with one party's service of citation on the other. *Rose v. Rose*, 117 S.W.3d 84, 87 (Tex. App.-Waco 2003, no pet.). If service of process is defective, the trial court fails to acquire jurisdiction over the person served. *North Carolina Mut. Life Ins. Co. v. Whitworth*, 124 S.W.3d 714, 722 (Tex. App.-Austin 2003, pet. denied). However, filing an answer constitutes a general appearance, thereby dispensing with the need for the issuance and service of citation. Tex. R. Civ. P. 121; *Burrow v. Arce*, 997 S.W.2d 229, 246 (Tex. 1999). Thus, filing an answer waives any complaints about service. *See In re S475,001.16*, 96 S.W.3d 625, 628-629 (Tex. App.-Houston [1st Dist.] 2002, no pet.) (attorney ad litem filed an answer on the party's behalf, waiving right to challenge any defects in service).

Here, the trial court appointed an attorney ad litem to

represent appellant on March 19, 2004. A week later, trial counsel filed an answer generally denying the allegations in the petition for termination. Thus, assuming without deciding that service was defective, the filing of an answer by appellant's attorney ad litem waives any complaints about defective service. *See In re $475,001.16*, 96 S.W.3d 628-629.

The initial order of appointment indicates counsel was appointed as an "attorney ad litem" to "represent" appellant. The attorney, acting under the authority of that order, filed an answer as the "attorney for respondent." Thereafter, in its "substitute" order of appointment, the trial court appointed the same attorney as guardian ad litem for appellant. Nothing in the record shows the answer was withdrawn. Rather, the record shows the trial court mistakenly stated that no answer had been filed and neither the guardian ad litem or CPS corrected this misunderstanding. We conclude the answer was filed by trial counsel in her role as an attorney ad litem appointed to represent appellant in this litigation and not in her role as a guardian ad litem. Thus, we overrule appellant's first issue.

In her third issue, appellant claims the trial court erred by failing to appoint an attorney to represent appellant. We disagree. The trial court appointed an attorney ad litem for appellant. Moreover, appellant does not cite any authority supporting this proposition. Appellant's citation to Tex.R.Civ. P.173 is not on point because rule 173 concerns the appointment of guardian ad litems.

To the extent appellant complains about the withdrawal

of the guardian ad litem, we will address the issue. The trial court proceeded with the termination hearing after allowing the guardian ad litem to withdraw. At the time of trial, rule 173 of the Texas Rules of Civil Procedures provided that "when a...non-compos mentis may be a defendant to a suit and has no guardian within this State...the court shall appoint a guardian ad litem for such person. *See* Tex. R. Civ. P.173 (amended by order January 27, 2005). Here, appellant had been declared incompetent and involuntarily committed to Terrell State Hospital. The trial court was aware appellant was an in-patient in a mental hospital and had appointed such a guardian. Nevertheless, the trial court allowed the guardian ad litem to withdraw on the day of the termination hearing and did not appoint a replacement. At the hearing, the trial court had no evidence that appellant was then competent and in fact, the record indicates the trial court was under the impression that appellant had not yet been released as an in-patient at Terrell State Hospital. Under these circumstances, we conclude the trial court erred by dismissing the guardian before the hearing.[3] The trial court's error in allowing the guardian ad litem to withdraw, however, does not relieve appellant of her burden under a bill of review proceeding.

We now determine if appellant has established the

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[3] We note that the comment to Rule 173 indicates that a guardian ad litem has a very limited role and does not participate in the conduct of the litigation.

required elements for a bill of review. A bill of review is an independent equitable action brought by a party to a former action seeking to set aside a judgment, which is no longer appealable or subject to a motion for a new trial. *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979). Because the burden on the bill of review petitioner is heavy, the grounds are narrow and restricted upon which a bill of review is granted. *Transworld Fin. Servs. Corp. v. Briscoe*, 722 S.W.2d. 407, 407 (Tex. 1987). To invoke the equitable powers of the court, the petitioner asking for a bill of review must allege and present prima facie proof (1) that she has a meritorious claim or defense, (2) that she was prevented from asserting by fraud, accident, or wrongful act of the opposite party or official mistake, and (3) without any fault or negligence of her own. *In re T.R.R.*, 986 S.W.2d 31, 35 (Tex. App.-Corpus Christi 1998, no pet.); *Alexander v. Hagedorn*, 226 S.W.2d 996, 998 (Tex. 1950). To uphold the burden on the bill of review, the court requires the petitioner to outline and prove all of the requirements. *See Alexander*, 226 S.W.2d at 998. Accordingly, a person who seeks to set aside a judgment by a bill of review must strictly comply with the rules providing for such relief. *Falsetti v. Lowman*, 405 S.W.2d 796, 799 (Tex.Civ.App.-Eastland 1966, writ ref'd n.r.e.).

In her bill of review and affidavit, appellant asserted that the trial court erred by allowing her attorney ad litem to withdraw and then proceeding with the hearing without an attorney representing appellant. Appellant also explained her

failure to assert the defense was not due to her own fault or negligence but rather because of her mental illness. Assuming this testimony constitutes both a meritorious defense and an explanation that failure to raise it was not due to her own fault or negligence, appellant still must meet the second requirement for a bill of review. Appellant failed to establish that she was prevented from asserting her defense because of some fraud, accident, or wrongful act of CPS.[4]

We recognize that exceptions have been created that relieve the applicant of the necessity of proving the second requirement where the applicant has been misled by a court officer, where a court officer failed to send notice of the default judgment, or where there was a failure to serve citation, but none of these exceptions apply to these facts. *Briscoe v. Transworld Fin. Servs. Corp.*, 705 S.W.2d 288, 291 (Tex. App.-San Antonio 1986), *rev'd on other grounds*, 722 S.W.2d 407 (1987). Although appellant asserts that she did not receive notice of the final judgment terminating her parental rights, Texas Family Code section 161.209 states "A copy of an order

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[4] Since appellant argued that she was not properly served, she relied on case law holding that she was not required to establish the first and second elements of a bill of review. See *Caldwell v. Barnes*, 154 S.W.3d 93, 96-97 (Tex.2004). However, we have determined that appellant has waived any defect in service because an answer was filed by her attorney ad litem; therefore, she must prove all three elements to succeed on her claim. As such, we overrule appellant's second issue.

of termination rendered under Section 161.206 is not required to be mailed to the parties as provided by Rules 199a and 239a, Texas Rules of Civil Procedure." Tex. Fam. Code Ann. § 161.209 (Vernon 2002). As such, the court clerk did not fail to perform any official duty under the rules of civil procedure allowing appellant to escape the second element of a bill of review.

Because appellant failed to sustain all of the bill of review requirements, we overrule appellant's third issue and affirm the trial court's order denying her bill of review.

s/CAROLYN WRIGHT
CAROLYN WRIGHT
JUSTICE

060147F.P05

Order issued August 25, 2006

(Seal)
The State of Texas

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-06-00147-CV

JOY PHILLIPS, Appellant

v.

DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT, Appellee

ORDER

Before Justices Wright, Moseley, and Lang

We DENY appellant's motion for rehearing.

s/CAROLYN WRIGHT
CAROLYN WRIGHT
JUSTICE

(Seal)

The State of Texas

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 06-0876 DATE: 6/1/2007
COA #: 05-06-00147-CV TC#: 05-378-X-305th

STYLE: JOY PHILLIPS
v. DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO:

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